No. SC87722

IN THE
SUPREME COURT OF MISSOURI

PRESIDENT RIVERBOAT CASINO-MISSOURI, INC.,

Appellant/Cross-Respondent,

v.

DIRECTOR OF REVENUE,

Respondent/Cross-Appellant.

Petition for Judicial Review
From the Missouri Administrative Hearing Commission
The Honorable John J. Kopp, Commissioner

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

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ARGUMENT

I (food and drink purchases).

The AHC erred in awarding President a refund of taxes it paid on its purchases of food and drink used to prepare free meals it gave away to its gambling patrons because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, and was contrary to the reasonable expectations of the General Assembly, in that the resale exclusion did not apply since the cost of these free meals was not factored into the cost of other meals or items that President sold and on which it collected sales tax, but was instead factored into the amount President set its gambling machines to recover in winnings from its casino operation; and these amounts are not subject to sales tax.

Although President agrees that the cost of the meals that it provided to certain of its casino customers was not factored into the price of the other meals it sold (and on which it collected sales tax), it nevertheless insists that it resold those free meals because the cost of those meals was factored into the amount it set its gambling machines to recover in winnings from its patrons. This concession effectively refutes President's argument— and the AHC's finding—that the free meals were resold to customers because the amounts President wins from patrons on its gambling machines are not subject to sales tax. Although President and the AHC correctly note that this Court has held that items given

away free to customers can still qualify for the resale exclusion, they overlook the fact that in each case the value of the free items was included in the cost of other items sold *and* on which sales tax was collected. President's admission that the cost of the free meals was not factored into the cost of the other meals sold in its restaurants, but were instead factored into the amount it set its gambling machines to recover, effectively defeats its argument and proves that the AHC erred in finding that the resale exclusion applied.

President attempts to fill the vacuum created by its argument by relying on language contained in § 313.822, RSMo Cum. Supp. 2005, which provides that "all functions incident to the administration, collection, enforcement, and operation of the tax imposed by sections 144.010 to 144.525, RSMo, [the sales tax law] shall be applicable to the taxes and fees imposed by this section." Relying solely on the word "operation," President contends that this shows that the gaming tax law must include every substantive provision of the sales tax laws, including the resale exclusion. This construction reads the word "operation" out of all proportion to the other words ("administration, collection, enforcement") with which it is associated and is contrary to the rules of statutory construction.

Moreover, President's reliance on one word from a single sentence in a statute comprised of over 500 words stands in stark contrast to the numerous other statutory provisions that demonstrate that the sales and gaming taxes are separate taxes, and that the General Assembly did not intend the wholesale

application of the substantive provisions of the sales tax law to the gaming tax. Those other sections are mentioned in detail in the Director's opening brief and need not be repeated here. President does not explain how its argument can be reconciled with these other statutory sections. Neither does it explain why the General Assembly chose to accomplish such a sweeping incorporation of the substantive provisions of the sales tax law into the gaming tax by use of an undefined and nebulous word ("operation") in a statutory section dealing primarily with the imposition of the gaming tax and the distribution of the proceeds generated by it.

The folly of President's argument is fully revealed by its attempt to apply statutory definitions found in the sales tax law to its gaming functions. For example, President equates its gambling customers' losses as "sales at retail." Yet, the statutory definition of sale at retail contained in the sales tax law applies to transfers of tangible personal property or the provision of taxable services. Section 144.010(10), RSMo Cum. Supp. 2005. Gambling losses in a casino are not the sales of tangible personal property, and the activity of gambling is not included as a taxable service under this definition.

Missouri's sales tax applies to transactions. But President's argument does not work on a transactional basis. For instance, President equates the act of putting money in a slot machine as a "rental" under the sales tax law. But if the customer puts in a coin and pulls the handle and wins more money than was

deposited in the machine, no sale—as that word is defined under the sales tax law—has taken place. Section 144.010 (9), RSMo Cum. Supp. 2005 (defining "sale" to require the transfer of tangible personal property or the furnishing of a taxable service for a "valuable consideration"). In this situation, there would be no amount on which the sales tax would apply because no consideration was paid for the privilege of playing the machine.

Moreover, President is taxed only on the amount it wins, which means that if a particular slot machine pays out more than it takes in, no gaming tax is owed. Section 313.822, RSMo 2000. But, unless the sale is otherwise exempt from tax, sales tax applies to each and every transaction, which in this example would include each act of putting money into the machine. President overlooks this critical distinction in advancing its argument.

Whether the casino wins more money from its customers than it pays out on an aggregate basis over a specified period of time is irrelevant since the sales tax is a transactional tax, while the gaming tax is not. President's unsuccessful attempts to apply the transactional definitions in the sales tax law to the provisions of the gaming tax starkly demonstrate how misguided its argument actually is.

II (timeliness of refund claims).

The AHC erred in finding that President's refund claims for the tax periods from January 1995 to November 1995 and from January 1998 to February 2000 were timely filed in March and April 2003 because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, and was contrary to the reasonable expectations of the General Assembly, in that the "date of overpayment" for purposes of the three-year limitation period for refund claims outlined in § 144.190.2, RSMo, were the dates President originally paid the tax, though erroneously reported it on its use tax return; and those dates were more than three years before it filed its refund claims.

Relying on its own mislabeling of tax payments, President concedes that while it paid "use taxes" more than three years before it filed its refund claims, they were nevertheless timely filed because it did not pay "sales tax" until the Director's auditor offset the amount of use tax President had erroneously labeled its tax payments to be against the sales tax it should have labeled its payments as. President's argument, which was relied upon by the AHC in finding that President timely filed its refund claims, gives a taxpayer the ability to unilaterally control the "date of payment" by manipulating either how it labels its tax payments or by paying an incorrect amount of tax.

This construction of the law is contrary to the principle that statutory

provisions waiving sovereign immunity, which includes statutes providing for the recovery of taxes illegally or erroneously paid, must be strictly construed against the taxpayer. *See Sprint Communications Co. v. Director of Revenue*, 64 S.W.3d 832, 894 (Mo. banc 2002). This Court has expressly held that the "date of overpayment," and thus § 144.190's three-year limitation period, begins "when the taxpayer remits payment of tax on the transactions that generate the issue of overpayment." *Ford Motor Company v. Director of Revenue*, 97 S.W.3d 458, 462 (Mo. banc 2003). Although it acknowledges that it paid the tax more than three years before it filed its refund claims, President fails to explain how the date on which the Director offset those taxes constituted a payment of tax by it to restart the limitations period.

President suggests that this case is controlled by this Court's decision in *Dyno Nobel, Inc. v. Director of Revenue*, 75 S.W.3d 240 (Mo. banc 2002). But that case has nothing do with the construction of the phrase "date of overpayment" as used in § 144.190 because no dispute arose in that case concerning the timeliness of the taxpayer's refund claim.

In *Dyno Nobel*, the taxpayer paid use tax on its intrastate purchases of electricity from another corporation that provided electricity to the taxpayer under a utilities agreement. *Id.* at 241. This Court held that the taxpayer was entitled to a refund of those use taxes because the electricity purchases occurred entirely within the State of Missouri, which made them potentially subject to sales tax, not

use tax. *Id.* at 243. Although the Director argued that the taxpayer's refund claim should be offset by the amount of sales tax that it should have paid, this Court held that no sales tax had been assessed by the Director against the taxpayer and that the corporation that sold the electricity to the taxpayer was legally responsible for paying the tax. *Id.* at 243-44.

Nothing in the Court's opinion can be read as defining the "date of overpayment" to begin on the date the Director offsets mislabeled tax payments against the tax owed on the same transactions. The timeliness of the refund claims was not an issue in either *Dyno Nobel* or *Shelter Mutual Ins. Co. v. Director of Revenue*, 107 S.W.3d 919 (Mo. banc 2003), another case on which President relies. *Shelter* involved an issue similar to that raised in *Dyno Nobel*: whether a taxpayer's otherwise timely refund claim should be offset by taxes it should have paid on the transactions in question. Again, this issue has nothing to do with the timeliness of the taxpayer's refund claim.

If President wanted to challenge the assessment of unpaid sales tax made by the Director or the amount of the Director's offset, it certainly had the ability to do that. In other words, if President believed that no tax whatsoever was owed on the transactions in question (the position it now takes in this case), it had the ability to challenge the Director's assessment by filing a complaint with the AHC. It did not do that. Instead, it filed a separate refund claim more than three years after it had paid the tax seeking a refund of all taxes paid on the transactions in

question. Those refund claims are barred by the three-year limitation periods and the Director's assessment of tax does nothing to enlarge that time period.

"The statute of limitations may be suspended or tolled only be specific disabilities or exceptions enacted by the Legislature and the courts are not empowered to extend those exceptions." *Shelter*, 107 S.W.3d at 923. In *Shelter*, this Court refused to extend the limitations period for assessing tax to enable to the Director to offset taxes the taxpayer sought to have refunded against the tax that the taxpayer stipulated was potentially otherwise owed on the transactions if it prevailed in its refund claim. In this case, President is seeking to extend the limitations period in a manner similar to that which this Court rejected in *Shelter*. That approach should be rejected here as well.

CONCLUSION

The AHC erred in setting aside the Director's decision denying President's refund claim for sales and use taxes relating to its purchases of food and drink used to prepare free meals and in finding that President's refund claims from January 1995 to November 1995 and from January 1998 to February 2000 were filed within the three-year limitation period. In all other respects, the AHC's decision was correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 2,133 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on November 17, 2006, to:

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